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U.S. DISTRICT COURT E.D.N.Y.
★ MAY 01 2007 ★
BROOKLYN OFFICE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

--------------------------------X
UNITED STATES OF AMERICA,

- versus -

MALCOLM GREEN,
Defendant
--------------------------------X

Docket#
06-cr-674(ERK)(CLP)

U.S. Courthouse
Brooklyn, New York

March 23, 2007

TRANSCRIPT OF CRIMINAL CAUSE FOR PLEADING
BEFORE THE HONORABLE CHERYL L. POLLAK
UNITED STATES MAGISTRATE JUDGE

A P P E A R A N C E S:

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Proceedings recorded by electronic sound-recording,
transcript produced by transcription service

Proceedings

THE CLERK: This is the matter of United States v. Malcolm Green, 06-cr-674.

Counsel, please state your appearances for the record.

MS. NAUGHTON: Kathleen Naughton for the government,

Good morning, your Honor.

THE COURT: Good morning.

MR. MIEDEL: Florian Miedel, Federal Defenders.

Good morning.

THE COURT: Good morning. You may be seated.

Good morning, Mr. Green.

THE DEFENDANT: Good morning.

THE COURT: I take it that you understand English.

THE DEFENDANT: Yes, I do.

THE COURT: All right. If at any point something is said that you don't understand, please let tell; okay?

THE DEFENDANT: All right.

THE COURT: All right.

The first issue I want to deal with today is your consent to have me hear your plea. You understand that this is Judge Korman's case and he is the United States district judge who will sentence you and who will make the ultimate decision as to whether or not to accept your plea of guilty.

THE DEFENDANT: I understand.

THE COURT: If you wish, you have the absolute right to have Judge Korman hear your plea and if you choose to do that, there will be no prejudice to you.

On the other hand, if you wish, I will hear your plea this morning and a transcript of these proceedings will be made from the tape recording devices here in the courtroom and that transcript will be given to Judge Korman to review at the time of your sentence and when he makes his decision as to whether or not to accept your plea of guilty.

Do you wish to give up your right to have Judge Korman hear your plea and proceed instead before me this morning?

THE DEFENDANT: I'll give it up.

THE COURT: Okay. You want me to hear your plea?

THE DEFENDANT: Yes.

THE COURT: Okay. Do you make this decision voluntarily and of your own free will?

THE DEFENDANT: Yes, I do.

THE COURT: Has anyone made any threats or promises to get you to agree to have me hear your plea?

THE DEFENDANT: No.

THE COURT: This is the consent form that I believe you signed earlier. Could you just take a look at it, Mr. Green, and tell me if you've seen it before.

THE DEFENDANT: Yes, I have.

THE COURT: Okay. And is that your signature there?

THE DEFENDANT: Yes, it is.

THE COURT: And I will note it's been signed by counsel for the defendant, by the assistant United States attorney and I am endorsing it, as well.

Now, Mr. Green, before I can hear your plea, there are a number of questions that I have to ask you to insure that it is a valid plea. Again, if you don't understand any of my questions, just tell me and I'll rephrase them for you; okay?

THE DEFENDANT: All right.

M A L C O L M G R E E N ,

called as a witness, having been first duly sworn, was examined and testified as follows:

THE COURT: You understand that having been sworn, your answers to my questions will be subject to the penalties of perjury or making a false statement if you don't answer them truthfully.

Do you understand that?

Proceedings

THE DEFENDANT: I understand.

THE COURT: What is your full name?

THE DEFENDANT: Malcolm Green.

THE COURT: And how old are you?

THE DEFENDANT: 23 years old.

THE COURT: What education have you had?

THE DEFENDANT: High school education.

THE COURT: Did you graduate?

THE DEFENDANT: GED.

THE COURT: Okay.

Have you had any problems communicating with Mr. Miedel, your attorney?

THE DEFENDANT: No.

THE COURT: Counsel, have you had any problems communicating with your client?

MR. MIEDEL: No.

THE COURT: Mr. Green, are you presently or have you recently been under the care of either a physician or a psychiatrist?

THE DEFENDANT: No.

THE COURT: In the last 24 hours, have you taken any narcotic drugs?

THE DEFENDANT: No.

THE COURT: Any medicine or pills of any kind in the last 24 hours?

THE DEFENDANT: No.

THE COURT: Have you had any alcohol to drink in the last 24 hours?

THE DEFENDANT: No.

THE COURT: Have you ever been hospitalized or treated for a narcotics addiction?

THE DEFENDANT: No, I haven't.

THE COURT: Have you ever been treated for any mental or emotional problems?

THE DEFENDANT: No.

THE COURT: As you sit here before me today, is your mind clear?

THE DEFENDANT: Yes, it is.

THE COURT: Do you understand what we're doing here today?

THE DEFENDANT: Yes.

THE COURT: Counsel, have you discussed the matter of pleading guilty with your client?

MR. MIEDEL: Yes, I have.

THE COURT: Does he understand the rights that he will be waiving by pleading guilty?

MR. MIEDEL: Yes.

THE COURT: In your view, is he capable of understanding the nature of these proceedings?

MR. MIEDEL: Yes.

THE COURT: Do you have any doubt as to his competence to plead at this time?

MR. MIEDEL: No.

THE COURT: Have you advised him of the maximum sentence and the fine that can be imposed as a result of his plea here?

MR. MIEDEL: Yes.

THE COURT: And have you discussed with him the operation of the sentencing guidelines and the recent supreme court decisions regarding the guidelines?

MR. MIEDEL: Yes, I have.

THE COURT: Mr. Green, do you feel that you've had enough time to discuss your case with Mr. Miedel, your attorney?

THE DEFENDANT: Yes, I have.

THE COURT: And are you satisfied to have him represent you?

THE DEFENDANT: Yes, I am.

THE COURT: All right.

Have you received a copy of the indictment?

THE DEFENDANT: Yes, I have.

THE COURT: Have you discussed the charge in the indictment with your attorney?

THE DEFENDANT: Yes, I have.

THE COURT: Now the indictment reads as

follows:

"On or about September 6, 2006 within the Eastern District of New York, the defendant, Malcolm Green, having been previously convicted in a court of a crime punishable by a term of imprisonment exceeding one year, did knowingly and intentionally possess in and effecting commerce, a firearm, specifically a Herman Wyrock (phonetic) 38 caliber revolver and ammunition in violation of United States law."

Do you understand what you have been charged with?

THE DEFENDANT: Yes, I do.

THE COURT: I want to make sure that you understand the rights that you will be giving up if you decide to plead guilty to this charge. The first and the most important thing you must understand is that you do not have to plead guilty even if you are guilty.

Under our system of law, the prosecutor has the burden of proving the guilt of a defendant beyond a reasonable doubt. And if the prosecutor is unable to meet her burden of proof, the jury has the duty to find the defendant not guilty even if he is guilty.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: So it happens in American

courtrooms and it has happened in this very courthouse, that a jury has returned a verdict of not guilty even though everyone in the courtroom knew that the defendant was, in fact, guilty. What the jury was saying in those cases was not that the defendant was innocent but rather that the prosecutor had failed to meet his or her burden of proving that the defendant was guilty.

Do you understand that?

THE DEFENDANT: I understand.

THE COURT: So that is why I say even if you are guilty, you have a choice. You may plead guilty as you apparently wish to do or you may say to the government prove it, meet your burden of proving my guilt beyond a reasonable doubt. And the way you exercise that option is by saying not guilty when I ask you how do you plead.

Do you understand that?

THE DEFENDANT: I understand.

THE COURT: All right.

THE COURT: If you were to persist in pleading not guilty, under the Constitution and the laws of the United States, you would be entitled to a speedy and public trial by jury with the assistance of counsel on the charge contained in the indictment.

Do you understand that?

THE DEFENDANT: I understand.

THE COURT: At the trial, you would be presumed innocent and the government would have to overcome that presumption and prove you guilty by competent evidence and beyond a reasonable doubt.

You would not have to prove that you were innocent. If the government were to fail, the jury would have the duty to find you not guilty.

Do you understand that?

THE DEFENDANT: I understand that.

THE COURT: In the course of a trial, the witnesses for the government would have to come to court and they would have to testify in your presence. Your attorney would have the right to cross-examine those witnesses for the government, to object to any evidence offered by the government and to offer evidence on your behalf.

Do you understand that?

THE DEFENDANT: I understand.

THE COURT: At the trial, while you would have the right to testify if you chose to do so, you could not be forced to testify. Under the Constitution of the United States, a defendant in a criminal case cannot be forced to take the witness stand and say anything that could be used to show that he is guilty of the crime with which he's been charged.

If you were to decide not to testify, the Court would instruct the jury that they could not hold that decision against you.

Do you understand that?

THE DEFENDANT: I understand.

THE COURT: If you plead guilty on the other hand, I'm going to have to ask you certain questions about what it is that you did in order to satisfy myself that you are, in fact, guilty of the charge to which you seek to plead guilty. And you're going to have to answer my questions and acknowledge your guilt.

Thus, you will be giving up that right that I just described; that is, the right not to say anything that could be used to show that you are guilty of the crime with which you've been charged.

Do you understand that?

THE DEFENDANT: I understand.

THE COURT: If you plead guilty and I recommend to Judge Korman that he accepts your plea, you will be giving up your constitutional right to a trial and all of the other rights that I have just described. There will be no further trial of any kind. Judge Korman will simply enter a judgment of guilty based upon your guilty plea.

Do you understand that?

THE DEFENDANT: I understand.

THE COURT: Are you willing to give up your right to a trial and the other rights that we have just described?

THE DEFENDANT: Yes, I am.

THE COURT: Now, I understand that the defendant is not pleading to a plea agreement today; is that the case?

MR. MIEDEL: That's correct.

THE COURT: Mr. Green, has anyone made any promise to you that has caused you to plead guilty here today?

THE DEFENDANT: No.

THE COURT: Has anyone made any promise to you as to what your sentence will be?

THE DEFENDANT: No.

THE COURT: I want to briefly review with you the sentencing scheme that applies here. The statute that you have been accused of violating carries a minimum term of imprisonment of zero years and a maximum of up to possibly ten years in prison.

Now as I mentioned earlier, there are in effect what are called sentencing guidelines and those guidelines determine where within that zero to ten year range your sentence will fall.

Those guidelines will determine how high a sentence could be imposed and how low a sentence can be imposed. Now the guidelines are not mandatory but the Court must consider the guidelines along with all other relevant factors in determining what an appropriate sentence for you should be.

Do you understand that?

THE DEFENDANT: I understand.

THE COURT: The important thing that you must understand is that until the time of sentencing when Judge Korman is going to get what is called a presentence report which will be prepared by the probation department following your plea here and the court has an opportunity to hear from you, to hear from your attorney, and to hear from the government, until that time, no one can promise you exactly what your sentence will be; not your attorney, not the government's attorney, not me, not even Judge Korman until then.

Do you understand that?

THE DEFENDANT: I understand.

THE COURT: Nevertheless, I am going to ask counsel to put on the record what your respective calculation of the guidelines are based on what we know today. Let me hear from the government first.

MS. NAUGHTON: Yes, your Honor. The government find that this offense would carry a base level of 18. That's based on 20 points minus two for acceptance of responsibility, therefore coming up with 18.

The government also has estimated that the defendant has a criminal history category of two. Therefore, the range of imprisonment would be 30 to 37 months.

THE COURT: All right. Mr. Miedel, do you have a quarrel with the government's estimate that you would like to put on the record or some different calculation?

MR. MIEDEL: Yes, your Honor. I believe that actually the base offense level in this case is 14 with two points off for acceptance of responsibility is a level 12, therefore making the corresponding term of incarceration 12 to 18 months.

THE COURT: Okay. And you are basing this on a criminal history category of two, as well?

MR. MIEDEL: Three -- of two; yes.

THE COURT: Two, right?

MR. MIEDEL: Two.

THE COURT: Okay.

So, Mr. Green, you understand that the government has come up with one estimate and your attorney believes a different guideline range is appropriate. At this point, no one can tell you what the judge is going to do or what the probation department is going to do.

Do you understand that?

THE DEFENDANT: I understand.

THE COURT: In fact, the Court or the probation department may come up with a different guideline range than that of either the government or your attorney. If that happens, you understand that you won't be allowed to withdraw your guilty plea.

THE DEFENDANT: I understand.

THE COURT: Okay.

You also understand that as a result of your plea, you face a potential term of supervised release. Do you know what supervised release is?

THE DEFENDANT: Yes, I do.

THE COURT: Okay. Basically, you'll complete any sentence of imprisonment that you're directed to serve, you'll be released from jail but there may be certain restrictions placed on your freedom, reporting to a probation officer, for example, is one restriction that is generally imposed.

Do you understand that?

THE DEFENDANT: I understand.

THE COURT: All right.

In this case, as a result of your plea, you face a maximum term of supervised release of three years. If you violate any of the conditions of supervised release, you can be sentenced up to two years in prison without getting any credit for the time that you previously served in prison and without getting any credit for the time that you served successfully on supervised release up until the date that you committed the violation.

Do you understand that?

THE DEFENDANT: I understand.

THE COURT: You also face a potential fine in this case. The maximum fine that can be imposed is $250,000.

Do you understand that?

THE DEFENDANT: Yeah.

THE COURT: Yes?

THE DEFENDANT: I understand.

THE COURT: And you must pay a $100 special assessment.

Do you understand that, as well?

THE DEFENDANT: Yes.

THE COURT: And I take it that Mr. Green is a citizen of the United States.

MR. MIEDEL: Yes.

THE COURT: Okay. All right.

Now, Mr. Green, you can appeal your conviction if you believe that your guilty plea here was somehow unlaw or involuntary or there was some other fundamental defect in these proceedings that was not waived by your plea.

You also have a statutory right to appeal your sentence under certain circumstances if you believe that your sentence is contrary to law. With few exceptions, any notice of appeal must be filed within ten days of judgment being entered in your case. And if you cannot afford to pay for the cost of an appeal, you may apply for leave to appeal in forma pauperis. What that means is that the clerk of the court will prepare and file the notice of appeal on your behalf.

Do you understand all of that?

THE DEFENDANT: I understand.

THE COURT: Do you have any questions that you would like to ask me about the charge or your rights or anything else before we proceed?

THE DEFENDANT: No.

THE COURT: Are you ready to plead?

THE DEFENDANT: Yes, I am.

THE COURT: Counsel, do you know of any reason why the defendant should not plead guilty?

MR. MIEDEL: No, your Honor.

THE COURT: Are you aware of any viable legal defense to the charge?

MR. MIEDEL: No.

THE COURT: Malcolm Green, what is your plea to Count Three of indictment 06-cr-674; guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: Are you making this plea of guilty voluntarily and of your own free will?

THE DEFENDANT: Yes, I am.

THE COURT: Has anyone threatened or forced you to plead guilty?

THE DEFENDANT: No.

THE COURT: Has anyone made any promise to you what your sentence will be?

THE DEFENDANT: No.

THE COURT: All right.

I read the charge to you a few minutes ago. I want you to tell me in your own words what happened on or about September 6, 2006 in connection with this firearm. Tell me where you were and what you were doing.

THE DEFENDANT: Well I was on my way home. I was stopped by officers. I was arrested for a firearm and I had a prior felony conviction, so --

THE COURT: Okay. Did you have this 38 caliber revolver and ammunition on your person at the time?

THE DEFENDANT: Yes, I did.

THE COURT: Okay. And did you know it was there?

THE DEFENDANT: Yes, I did.

THE COURT: Okay. And your prior felony conviction was punishable by a term of more than one year in prison?

THE DEFENDANT: One year.

THE COURT: One year; okay. And where exactly were you stopped by the police?

THE DEFENDANT: In front of my building, 259 Mother Gaston.

THE COURT: Is that in Brooklyn?

THE DEFENDANT: Brooklyn, New York.

THE COURT: And this was on or about September 6, 2006

THE DEFENDANT: Yes.

THE COURT: Okay. And what would the government's proof be with respect to interstate commerce?

MS. NAUGHTON: Your Honor, this has been -- the gun has been reviewed by an agent with ATF and determined that it was not manufactured in the state of New York.

Therefore, it had to effect commerce to be in Brooklyn.

THE COURT: All right.

Anything else?

MR. MIEDEL: No.

THE COURT: Based on the information given to me, I find that the defendant is acting voluntarily, fully understands his rights and the consequences of his plea and that there is a factual basis for the plea. I will recommend to Judge Korman that he accept your plea of guilty to the charge in the indictment.

What happens now is you're going to meet with the probation department to prepare the presentence report that we talked about a little bit earlier. I urge you to cooperate with them, obviously with your attorney's advice.

Once that report is prepared, then a date will be set by the probation department for sentencing. Okay?

Any application with respect to bail? I take it that Mr. Green is out on bail. The same conditions are remaining in effect until the time of sentencing.

MS. NAUGHTON: The government would not oppose him remaining at liberty pending sentence. However, if he wants to start getting credit for any time now, the government would not oppose a permanent order of detention.

THE COURT: Okay. Well --

MR. MIEDEL: I think he would decline that opportunity.

THE COURT: Okay. All right.

MS. NAUGHTON: Well sometimes they want to get a --

THE COURT: All right. Thank you, everybody.

MR. MIEDEL: Thank you.

(Matter concluded)

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C E R T I F I C A T E

I, ROSALIE LOMBARDI, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this **25th** day of **April**, 2007.

Rosalie Lombardi

Rosalie Lombardi
Transcription Plus II